93-784

No. _____

Supreme Court, U.S.
FILED
NOV 17 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

UNITED TRANSPORTATION UNION and
KENT MADISON,

Petitioners,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

KEVIN C. BRODAR
Associate General Counsel
UNITED TRANSPORTATION UNION
14600 Detroit Avenue
Cleveland, Ohio 44107-4250
(216) 228-9400

Attorney for Petitioners

Date: November 16, 1993

QUESTION PRESENTED FOR REVIEW

Did the court below err in creating a public policy basis to review and vacate a Railway Labor Act arbitration award when no such public policy basis for review exists under the Act's provisions controlling arbitration? See 45 U.S.C. § 153 First (p), (q).

PARTIES TO THE PROCEEDING BELOW

1. United Transportation Union, defendant-appellant below.
2. Kent Madison, defendant-appellant below.
3. Union Pacific Railroad, plaintiff-appellee below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	12
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES:

American Train Dispatchers Association v. Norfolk & Western Ry., 937 F.2d 365 (7th Cir. 1991) 9

Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972) 8, 10

Benoni v. Boston & Maine Corp., 828 F.2d 52 (1st Cir. 1987) 9

Brock v. Republic Airlines, 776 F.2d 523 (5th Cir. 1985) 9

Brotherhood of Railroad Trainmen v. Chicago River & Indiana, 353 U.S. 30 (1957) 10, 11

Chernak v. Southwest Airlines, 778 F.2d 578 (10th Cir. 1985) 9

Consolidated Rail Corp. v. Railway Labor Executives Association, 491 U.S. 299 (1989) 9, 10

Dement v. Richmond, Fredericksburg & Potomac RR, 845 F.2d 451 (4th Cir. 1988) 9

Diamond v. Terminal Railway Alabama State Docks, 421 F.2d 228 (5th Cir. 1970) 6

Gunther v. San Diego & A.E.R. Co., 382 U.S. 257 (1965) 8, 10

International Association of Machinists v. Northwest Airlines, 858 F.2d 427 (8th Cir. 1988) 6

Jones v. Seaboard System RR, 783 F.2d 639 (6th Cir. 1986) 9

Locomotive Engineers v. Louisville & Nashville R. Co., 373 U.S. 33 (1963) 8

Myron v. Consolidated Rail Corp., 752 F.2d 50 (2d Cir. 1985) 9

TABLE OF AUTHORITIES – Continued

Page

Pacific & Arctic Ry. v. UTU, 952 F.2d 1144 (9th Cir. 1991) 9

Union Pacific Railroad v. United Transportation Union and K. Madison, 8th Cir. No. 92-2547 1

Union Pacific RR Co. v. Price, 360 U.S. 601 (1959) ..8, 11

Union Pacific v. Sheehan, 439 U.S. 89 (1978) 6, 7, 8, 9, 11

Union Pacific v. UTU & Bedell Gray, 820 F. Supp. 1198 (D. Neb. 1993) 11

United Paperworkers Int'l. Union v. Misco, 484 U.S. 29 (1987) 10, 11

United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 10

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 10

United Steelworkers v. Union RR, 648 F.2d 905 (3d Cir. 1981) 9

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 10

W. R. Grace & Co. v. Local Union 789, 461 U.S. 757 (1983) 10, 11

STATUTES:

28 U.S.C. § 1254(1) 2

45 U.S.C. § 151 et seq..... 2

45 U.S.C. § 153 First (p) and (q)..... 6

45 U.S.C. § 153 First (q) 2, 3, 6, 7, 11

TABLE OF AUTHORITIES – Continued

Page

45 U.S.C. § 153 Second 5

49 C.F.R. § 219.301 3

Act of June 21, 1934, ch. 691, 48 Stat. 1185..... 7

Act of June 20, 1966, P.L. No. 89-456, 80 Stat. 208 7

No. _____

In The

Supreme Court of the United States

October Term, 1993

UNITED TRANSPORTATION UNION and
KENT MADISON,

Petitioners,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners United Transportation Union ("UTU") and Kent Madison respectfully petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review, and upon review, to reverse the August 19, 1993 decision and judgment of that Court in *Union Pacific Railroad v. United Transportation Union and K. Madison*, 8th Cir. No. 92-2547.

OPINIONS BELOW

The opinion of the Court of Appeals, which is officially reported at 3 F.3d 255 (8th Cir. 1993), and the memorandum opinion of the district court for the district of Nebraska, 794 F.Supp. 891 (1992), appear in the Appendix to this petition at App. 1 and App. 28, respectively. References to "App." are to the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this proceeding is the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, pertinent provisions of which are set forth at App. 39-43.

STATEMENT OF THE CASE

This case arises from the discharge and eventual reinstatement of Kent Madison by Public Law Board No. 4689. On July 16, 1991, Union Pacific Railroad Company filed a petition in district court for the district of Nebraska pursuant to 45 U.S.C. § 153 First (q), seeking to have the Board award overturned.

On June 12, 1992, the district court issued its decision overturning the award because it violated public policy, a basis not specified in 45 U.S.C. § 153 First (q). On August 19, 1993, the Court of Appeals issued its decision affirming the district court's public policy determination, but reversing the court's other determinations which are not at issue here.

STATEMENT OF FACTS

The facts are not in dispute, were accurately stated by the Court of Appeals in its August 19, 1993 decision, (App. 2-5) and are repeated below.[1]

> On January 9, 1989, W. R. Lake, a manager from the Union Pacific Railroad Company ("Union Pacific"), overheard a radio communication concerning a run-through switch at the Cheyenne, Wyoming railroad yard. Lake went to the Cheyenne yard to investigate and conducted separate interviews with each member of the crew involved in the incident. Madison, a brakeman, admitted that he had improperly lined the switch against the movement of the train, causing two and a half cars to run through and damage the switch.
>
> Lake sent Madison to the Laramie County Memorial Hospital for a reasonable-cause toxicological test pursuant to Federal Railroad Administration regulations. *See* 49 C.F.R. § 219.301. Madison submitted to two urine tests,

[1] For the sake of brevity, footnote 1 of the Court of Appeals' decision was deleted and footnote 2 has been shortened.

which were forwarded to a medical laboratory for review. Lake drove Madison back to the depot and informed Madison that he was being removed from service pending receipt of the drug test results.

On January 13, 1989, Union Pacific notified Madison that it would conduct a hearing to investigate Madison's possible violations of Union Pacific's Rule G, an industry-wide rule that prohibits the use of drugs or alcohol on the job, while subject to duty, or on company property. Union Pacific held an on-property hearing on January 17 to determine whether Madison had violated either Rule G or company rules concerning the lining of the switch. Near the conclusion of the hearing, the hearing officer remarked on the record that Madison "reek[ed] of alcohol." The hearing officer then asked two other Union Pacific employees to determine whether they also smelled alcohol on Madison's person. Although the two employees stated that they smelled something, they could not tell what it was. After the union representative voiced his objection to the hearing officer's statement and actions, the hearing officer concluded the hearing. On January 24, 1989, Union Pacific notified Madison that the charges against him had been sustained and that he was being discharged for violating Rule G.

The union appealed on Madison's behalf, and the dispute was ultimately submitted to arbitration before a Public Law Board (the "Board")[2] consisting of one union representative, one Union Pacific representative, and a

---

[2] Public law boards created under the Railway Labor Act are also often referred to as adjustment boards or special boards

neutral chairman. The chairman ruled on the Board's behalf that Union Pacific's hearing officer had violated Madison's due process rights as established in the collective bargaining agreement because the hearing officer's comments had strayed outside the issues submitted for determination and had denied Madison a fair hearing. Consequently, the Board never considered whether Madison had, in fact, violated Rule G.[3] The Board ordered Union Pacific to reinstate Madison with full rights and backpay for all lost time except for ninety calendar days, which the Board assessed as Madison's penalty for admittedly mislining the switch. The Board conditioned Madison's reinstatement on passing the normal back-to-work examinations. Union Pacific's representative dissented, asserting that the Board's award "[put] back to work a proven user of alcohol and drugs," in violation of public policy.

Rather than reinstating Madison, Union Pacific filed a complaint in federal district court, seeking to have the Board's award overturned. The union and Madison counterclaimed for enforcement of the award. Both sides filed summary judgment motions. The district court

---

of adjustment. Public law boards are created by agreement between employers and unions to take the place of compulsory arbitration before the National Railroad Adjustment Board. 45 U.S.C. § 153 Second.

[3] Union Pacific asserts that the results of the January 9 toxicological test, which were presented to the Board, showed that Madison had alcohol, cocaine, and marijuana in his system at the time of the incident. The union counters that because the Board never passed on the reliability of the test, Madison's use of drugs has not been established.

granted Union Pacific's motion and vacated the award, finding that reinstating Madison would violate the public policy against the use of drugs and alcohol by railroad employees.

REASONS FOR GRANTING THE WRIT

This Court should decide the important statutory issue of whether public policy can be grafted onto 45 U.S.C. § 153 First (q) as a basis for review of RLA arbitration awards. Further, this Court should review the Court of Appeals decision as it is in conflict with this Court's decision in *Union Pacific v. Sheehan*, 439 U.S. 89 (1978).

The Court of Appeals affirmed the district court decision vacating a Public Law Board (PLB) award on the basis of public policy. Such a basis does not exist in the statutorily prescribed review standards of the RLA and this Court has specifically held that an award can only be reviewed on one of those bases enumerated in the statute and no others. *Union Pacific v. Sheehan*, 439 U.S. at 93-94.

It is also well settled that the scope of judicial review in board enforcement cases is "among the narrowest known to law." *Diamond v. Terminal Railway Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970); *International Association of Machinists v. Northwest Airlines*, 858 F.2d 427, 429 (8th Cir. 1988).

Under the RLA, the Act which provided the authority to establish the arbitration panel herein, there exist only three extremely narrow bases to review arbitration awards. 45 U.S.C. § 153 First (p) and (q). A court may *only* review an award if: (1) the Board does not comply with

the requirements of the RLA; (2) the Board exceeds its jurisdiction; or, (3) there is fraud or corruption involving a Board member. 45 U.S.C. § 153 (q); *Union Pacific v. Sheehan*, 489 U.S. 89, 93 (1978). This language is plain and its meaning is clear. Only three bases exist to review RLA awards.

Neither Congress nor this Court has seen fit to either legislatively or judicially create a fourth basis for review. Since the National Railroad Adjustment Board was created in 1934,[4] Congress has had much time and opportunity to broaden the scope of review of board awards, especially in 1966 when the Act was amended to permit establishment of special boards of adjustment.[5] Congress, however, has chosen not to do so and review remains limited.

This Court has not seen fit to carve any judicial exception into what Congress has created and left unchanged for nearly 60 years. In fact, in *Union Pacific v. Sheehan*, 439 U.S. 89 (1978), this Court rejected the Tenth Circuit's attempt to create a "due process" base of review for PLBs.

The Court's language is clear in its total refusal to allow a judicially created base of review.

> *Judicial review* of Adjustment Board orders *is limited to three specific grounds* [listed in 45 U.S.C. § 153 First (q)]. *Only upon one or more of these bases may a court set aside an order* of the Adjustment Board. See *Andrews v. Louisville & Nashville*

---

[4] See Act of June 21, 1934, ch. 691, 48 Stat. 1185.

[5] See Act of June 20, 1966, P.L. No. 89-456, 80 Stat. 208.

> *R. Co.*, 406 U.S. at 325, 32 L.Ed.2d 95, 92 S.Ct. 1562; *Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U.S. 33, 38, 10 L.Ed.2d 172, 83 S.Ct. 1059 (1963).
>
> * * *
>
> Characterizing the issue presented as one of law, as the Court of Appeals seemed to do here, does not alter the availability or scope of judicial review. *The dispositive question is whether the party's objections* to the Adjustment Board's decision *fall within any of the three limited categories of review provided* for in the [RLA]. Section 153 First (q) unequivocally states that the "findings and order of the [Adjustment Board] shall be conclusive on the parties" and *may be set aside only for the three reasons specified therein.* We have time and time again emphasized that *this statutory language means just what it says.* See, e.g., *Gunther v. San Diego & A.E.R. Co.*, 382 U.S. 257, 263, 15 L.Ed.2d 308, 86 S.Ct. 368 (1965); *Locomotive Engineers v. Louisville & Nashville R. Co., supra* at 38 . . . ; *Union Pacific RR Co. v. Price*, 360 U.S. 601, 616 . . . (1959).

(Emphasis added) *Sheehan*, 439 U.S. at 93-94. In *Sheehan*, an employee was discharged for violating a work rule. The employee filed a wrongful discharge suit in state court. During the pendency of the employee's case, the Supreme Court decided *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), which required an employee alleging a contract violation to submit the matter to an adjustment board. Following that decision the employee and carrier agreed to dismiss the state action. The employee then began proceedings before the Adjustment Board. The Board dismissed the claim because the employee failed to file

within the specified bargaining agreement time limits. The employee then sought review arguing the time limits were tolled during the state action and he should be permitted to have his claim heard by the Adjustment Board. The district court upheld the award. The Tenth Circuit reversed, ruling that the award deprived Sheehan of his due process rights. *Sheehan* at 90. The Supreme Court, as quoted above, rejected the Tenth Circuit's attempt to expand review, even though the Board denied Sheehan an opportunity to be heard in violation of due process.

In *Sheehan*, this Court could have easily extended review on the very fundamental right to due process. It chose, however, not to do so, stressing that there are *only three (3) grounds* Congress established for review of an adjustment board award *and no others*.[6] This extremely narrow review was again approved by the Court in *Consolidated Rail Corp. v. Railway Labor Executives Association*, 491 U.S. 299, 304 (1989).[7]

---

[6] *Sheehan* has been uniformly and unquestionably followed in the vast majority of circuits. See *Benoni v. Boston & Maine Corp.*, 828 F.2d 52, 54 n.3 (1st Cir. 1987); *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 52 (2d Cir. 1985); *United Steelworkers v. Union RR*, 648 F.2d 905 (3d Cir. 1981); *Dement v. Richmond, Fredericksburg & Potomac RR*, 845 F.2d 451, 458 (4th Cir. 1988); *Brock v. Republic Airlines*, 776 F.2d 523, 526 (5th Cir. 1985); *Jones v. Seaboard System RR*, 783 F.2d 639, 642 (6th Cir. 1986); *American Train Dispatchers Association v. Norfolk & Western Ry.*, 937 F.2d 365 (7th Cir. 1991); *Pacific & Arctic Ry. v. UTU*, 952 F.2d 1144, 1147 (9th Cir. 1991); *Chernak v. Southwest Airlines*, 778 F.2d 578, 580 (10th Cir. 1985).

[7] "The Board (as we shall refer to any adjustment board under the RLA) has exclusive jurisdiction over minor disputes.

Here, the Court of Appeals refused to apply the strict language of the RLA or follow this Court's enforcement of it. Instead, the majority of the appellate court looked to *W. R. Grace & Co. v. Local Union 789*, 461 U.S. 757 (1983) and *United Paperworkers Int'l. Union v. Misco*, 484 U.S. 29 (1987). Those cases, as the Court of Appeals noted, established a very narrow public policy exception to the review of National Labor Relations Act (NLRA) arbitration awards established by this Court in the *Steelworkers* Trilogy. See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The *Steelworkers* cases created a standard for review for NLRA awards since Congress had not. That, however, is not the case under the RLA where Congress created a mandatory arbitration procedure with no analogy under the NLRA, and specifically intended that review of awards under this mandatory system be only on three bases.[8]

Judicial review of the arbitral decision is limited. See § 3 First (q); *Union Pacific R. Co. v. Sheehan." Consolidated Rail Corp.*, 491 U.S. at 304.

[8] Congress in mandating this statutory scheme of mandatory arbitration under the RLA specifically intended to severely limit the power of courts to set aside awards of the NRAB or PLB's. *Andrews v. Louisville & Nashville*, 406 U.S. 320 (1972); *Union Pacific v. Price*, 360 U.S. 601, 607-16 (1959); *Brotherhood of Railroad Trainmen v. Chicago River & Indiana*, 353 U.S. 30 (1957).

This Court has forcefully and repeatedly confirmed the limited role of the courts in "minor dispute" resolution and under the RLA. In *Gunther v. San Diego & Eastern Arizona Ry.*, 382 U.S. 257 (1965), the court reviewed and remanded a lower court's refusal to enforce an order of the NRAB in favor of an

This Court has without question, confirmed that intent of Congress. Section 3 First (q), 45 U.S.C. § 153 First (q), means exactly what it says. *Sheehan*, 439 U.S. at 94. Review of an RLA arbitration award "is limited to [the] three specific grounds [listed in 45 U.S.C. § 153 First (q)]." *Id.* at 93.

Further, as Judge McMillan noted in his dissent, *W. R. Grace* and *Misco* were not decided under the RLA and neither refers to the RLA or *Sheehan*. (App. 23). He also noted that the vast majority of cases applying the public policy exception have not involved the RLA and those that do involve the RLA lack any meaningful analysis. (*Id.*) He further noted that one case has expressly refused to apply any public policy exception to the RLA. *Union Pacific v. UTU & Bedell Gray*, 820 F. Supp. 1198 (D. Neb. 1993).

---

employee, specifically rejecting the contention that a court may consider the underlying merits of a board decision.

> We hold it cannot. *This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board.* In Brotherhood of Railroad Trainmen v. Chicago & Indiana R.Co., 353 U.S. 30, the Court gave a Board decision in the same finality that a decision of arbitrators would have. In Union Pacific R. Co. v. Price, 360 U.S. 601, the Court discussed the legislative history of the Act at length and pointed out that it "was designed for effective and final decision of grievances which arise daily" and its "statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the board. . . . " 360 U.S. at 616, 3 L. Ed. 2d at 1469.

(Emphasis added) 382 U.S. at 263.

It is clear that the Court of Appeals decision is directly contrary to the statutory prescriptions of the RLA and this Court's enforcement of the Act.

CONCLUSION

The statutory language of the RLA is clear as this Court has stated. Only three bases of review exist. Public policy is not one of those bases. Accordingly, UTU and Kent Madison respectfully request that the writ be issued as requested herein.

Respectfully submitted,

KEVIN C. BRODAR,
Associate General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107
(216) 228-9400

Attorney for Petitioners

Date: November 16, 1993

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2547

Union Pacific Railroad Company, Appellee, v. United Transportation Union, also known as C & T, also known as UTU; Kent H. Madison, Appellants.	* * * * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska.

Submitted: January 22, 1993

Filed: August 19, 1993

Before McMILLIAN, WOLLMAN, and BEAM, Circuit Judges.

WOLLMAN, Circuit Judge.

United Transportation Union (the "union") and Kent H. Madison appeal from the district court's order vacating an arbitration award in Madison's favor on the ground that the award violates public policy. We affirm in part, reverse in part, and remand for further proceedings.

I.

The facts in this case are essentially undisputed. On January 9, 1989, W.R. Lake, a manager for the Union Pacific Railroad Company ("Union Pacific"), overheard a radio communication concerning a run-through switch at the Cheyenne, Wyoming railroad yard. Lake went to the Cheyenne yard to investigate and conducted separate interviews with each member of the crew involved in the incident. Madison, a brakeman, admitted that he had improperly lined the switch against the movement of the train, causing two and a half cars to run through and damage the switch.

Lake sent Madison to the Laramie County Memorial Hospital for a reasonable-cause toxicological test pursuant to Federal Railroad Administration regulations. *See* 49 C.F.R. § 219.301. Madison submitted to two urine tests, which were forwarded to a medical laboratory for review. Lake drove Madison back to the depot and informed Madison that he was being removed from service pending receipt of the drug test results.

On January 13, 1989, Union Pacific notified Madison that it would conduct a hearing to investigate Madison's possible violations of Union Pacific's Rule G, an industry-wide rule that prohibits the use of drugs or alcohol on the job, while subject to duty, or on company property.[1]

---

[1] Rule G reads as follows:
The use of alcoholic beverages, intoxicants, drugs, narcotics, Marijuana or controlled substances by employees subject to duty, when on duty or on Company property is prohibited.

Union Pacific held an on-property hearing on January 17 to determine whether Madison had violated either Rule G or company rules concerning the lining of the switch. Near the conclusion of the hearing, the hearing officer remarked on the record that Madison "reek[ed] of alcohol." The hearing officer then asked two other Union Pacific employees to determine whether they also smelled alcohol on Madison's person. Although the two employees stated that they smelled something, they could not tell what it was. After the union representative voiced his objection to the hearing officer's statement and actions, the hearing officer concluded the hearing. On January 24, 1989, Union Pacific notified Madison that the charges against him had been sustained and that he was being discharged for violating Rule G.

The union appealed on Madison's behalf, and the dispute was ultimately submitted to arbitration before a Public Law Board (the "Board")[2], consisting of one union

---

> Employees must not report for duty, or be on Company property under the influence of or use while on duty or have in their possession while on Company property, any drug, alcoholic beverage, intoxicant, narcotic, marijuana, medication, or other substance, including those prescribed by a doctor, that will in any way adversely affect their alertness, coordination, reaction, response or safety.

The Federal Railroad Administration has codified the provisions of Rule G by adopting substantially identical regulations. *See* 49 C.F.R. §§ 219.101-102.

[2] Public law boards created under the Railway Labor Act are also often referred to as adjustment boards or special boards of adjustment. Public law boards are created by agreement between employers and unions to take the place of compulsory

representative, one Union Pacific representative, and a neutral chairman. The chairman ruled on the Board's behalf that Union Pacific's hearing officer had violated Madison's due process rights as established in the collective bargaining agreement because the hearing officer's comments had strayed outside the issues submitted for determination and had denied Madison a fair hearing. Consequently, the Board never considered whether Madison had, in fact, violated Rule G.[3] The Board ordered Union Pacific to reinstate Madison with full rights and backpay for all lost time except for ninety calendar days, which the Board assessed as Madison's penalty for admittedly mislining the switch. The Board conditioned Madison's reinstatement on passing the normal back-to-work examinations. Union Pacific's representative dissented, asserting that the Board's award "[put] back to work a proven user of alcohol and drugs," in violation of public policy.

Rather than reinstating Madison, Union Pacific filed a complaint in federal district court, seeking to have the

---

arbitration before the National Railroad Adjustment Board. 45 U.S.C. § 153 Second.

[3] Union Pacific asserts that the results of the January 9 toxicological test, which were presented to the Board, showed that Madison had alcohol, cocaine, and marijuana in his system at the time of the incident. The union counters that because the Board never passed on the reliability of the test, Madison's use of drugs has not been established. As discussed below, we may not make or rely on factual findings that the Board has not made. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 44-45 (1987). Accordingly, we have not decided this case on the assumption that the drug test results were positive.

Board's award overturned. The union and Madison counterclaimed for enforcement of the award. Both sides filed summary judgment motions. The district court granted Union Pacific's motion and vacated the award, finding that reinstating Madison would violate the public policy against the use of drugs and alcohol by railroad employees. *See Union Pac. R.R. v. United Transp. Union*, 794 F. Supp. 891, 895 (D. Neb. 1992). The district court remanded the action to the Board, directing it to order a new on-property hearing before a Union Pacific hearing officer. This appeal followed.

II.

After oral argument in this case, we directed the parties to file supplemental briefs on the question whether we possess jurisdiction to hear this appeal. Having considered the parties' contentions and the relevant case law, we conclude that under the facts of this case the district court's decision is a final order, appealable under 28 U.S.C. § 1291.

"A 'final decision' [under section 1291] generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945); *see also Thomas v. Basham*, 931 F.2d 521, 523 (8th Cir. 1991); *Transportation Communication Div. v. St. Louis-San Fran. Ry.*, 419 F.2d 933, 935 (8th Cir. 1969), *cert. denied*, 400 U.S. 818 (1970). The district court's ruling in this case, which it styled as an "order and judgment," granted Union Pacific's motion for summary judgment and vacated the Board's award, rendering the award a nullity. The effect

of the district court's order was to resolve completely the question whether Union Pacific's procedural violations in the first on-property hearing entitled Madison to reinstatement. Moreover, if we do not review the district court's order at this point, it will become essentially unreviewable because an enforcement action after a second Board award would be limited to the propriety of that award.

Although the court did remand the case, it remanded with directions for a new on-property hearing, impliedly on the merits of the Rule G violation. This remand was not for the purpose of seeking clarification from the Board or directing the Board to receive additional evidence. *Cf. Transportation-Communication Div.*, 419 F.2d at 935 (district court's remand was not appealable where remand order directing public law board to consider additional evidence did not rule on either parties' summary judgment motions); *United Steelworkers v. Aurora Equip. Co.*, 830 F.2d 753, 754-55 (7th Cir. 1987) (court of appeals lacked jurisdiction to review remand order directing arbitrator to consider new report and to decide two additional factual issues). Rather, the remand for a new on-property hearing on the merits of the Rule G allegation was, in practical effect, an order compelling a second arbitration, which generally constitutes a final decision for purposes of section 1291. *See Goodall-Sanford, Inc. v. United Textile Workers Local 1802*, 353 U.S. 550, 551-52 (1957) (order compelling arbitration under section 301 of Labor Relations Management Act is appealable as final order); *University Life Ins. Co. of America v. Unimarc Ltd.*, 699 F.2d 846, 848 (7th Cir. 1983) (discussing generally

when orders to arbitrate constitute final orders for purposes of section 1291).

III.

Turning to the merits of the appeal, we must initially confront the question whether federal courts possess authority to vacate arbitration awards under the Railway Labor Act on public policy grounds. We conclude that federal courts may do so when those awards violate well-defined and dominant public policies.

The Railway Labor Act contains a comprehensive system of dispute resolution for employer/employee disputes involving the interpretation of collective bargaining agreements. Congress created this system, under which these "minor" disputes are resolved by mandatory arbitration, to promote stability in labor-management relations in the nation's vital railroad industry. *See Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978) (per curiam). Accordingly, the Railway Labor Act contains only three statutory bases for review of a decision issued by a public law board: (1) failure of the adjustment board or public law board to comply with the requirements of the Railway Labor Act; (2) failure of the adjustment board or public law board to conform, or confine itself, to matters within the scope of its jurisdiction; and (3) fraud or corruption on the board's part. 45 U.S.C. § 153 First (q); *see Sheehan*, 439 U.S. at 93. We, as other courts, have noted that statutory review of arbitration awards under the Railway Labor Act is "among the narrowest known to the law." *International Ass'n of Machinists v. Northwest Airlines*, 858 F.2d 427, 429 (8th Cir. 1988); *Benoni v. Boston and*

Maine Corp., 828 F.2d 52, 54 n.3 (1st Cir. 1987); *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970).

The union and Madison argue that Congress's choice in enacting such narrow grounds for review in the Railway Labor Act precludes federal courts from reviewing such awards on public policy grounds. Moreover, they assert that since the enactment of the Railway Labor Act's review scheme in 1934, the Supreme Court has not seen fit to create any additional nonstatutory bases for review.

The strongest support for the union and Madison's argument stems from the Supreme Court's opinion in *Union Pacific R.R. v. Sheehan*. In that case, Sheehan had filed a breach of contract suit in state court arising out of his discharge. While his state court case was pending, the United States Supreme Court decided *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972), in which the Court held that a railroad employee alleging a violation of a collective bargaining agreement must submit the matter to arbitration under the Railway Labor Act. When Sheehan subsequently filed his arbitration claim before the National Railroad Adjustment Board, the board dismissed his claim as untimely, rejecting Sheehan's claim that the time limits should have been equitably tolled while his state court suit was pending. The district court upheld the board's order, but the Tenth Circuit reversed. The Tenth Circuit reasoned that the Supreme Court's holding in *Andrews*, which had forced employees into arbitration before an adjustment board, required that the courts give less deference to purely legal issues decided by an adjustment board. *Sheehan v. Union Pacific R.R.*, 576 F.2d 854, 856 (10th Cir. 1978). Thus, the Tenth Circuit held

that "the failure of the Board to consider tolling under these circumstances deprived Sheehan of an opportunity to be heard in violation of his right of due process." *Id.* at 857.

The Supreme Court reversed and reinstated the adjustment board's award, *Sheehan*, 439 U.S. at 94, holding that the Tenth Circuit had exceeded its jurisdiction. The Court stated that its holding in *Andrews* had not provided courts with greater latitude to correct an adjustment board's errors of law:

> Characterizing the issue presented as one of law, as the Court of Appeals seemed to do here, does not alter the availability or scope of judicial review: The dispositive question is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the Railway Labor Act.

Id. at 93. Thus, because Sheehan had failed to show that the adjustment board's order fell within any of the three statutory categories for review, the order should have been enforced by the courts. *Id.* at 94.

Although the Supreme Court's decision in *Sheehan* demonstrates the Court's concern for the finality of adjustment board awards under the Railway Labor Act, we disagree with the union and Madison's argument that it precludes federal courts from vacating such an award on public policy grounds. The Court in *Sheehan* did not address any public policy arguments; it merely responded to the Tenth Circuit's assertion that federal courts may review purely legal issues raised in arbitration awards. Moreover, we have uncovered no other

opinion by either the Supreme Court or another court of appeals that expressly rejects the idea that federal courts may use public policy as a basis for overturning a board award rendered under the Railway Labor Act.

To the contrary, federal courts have consistently held that they may not enforce contracts that violate public policy. As the Supreme Court has stated,

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

Hurd v. Hodge, 334 U.S. 24, 34-35 (1948) (footnotes omitted).

The Supreme Court and our court have applied the public policy doctrine in cases involving arbitration awards. *See, e.g., United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) ("A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy."); *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983); *Iowa Elec. Light & Power v. Local Union 204*, 834 F.2d 1424, 1427 (8th Cir. 1987) (overturning arbitration award reinstating

nuclear power plant employee that had defeated containment safety devices).

The union and Madison dismiss these cases as irrelevant because they were decided under the National Labor Relations Act. They contend that arbitration awards under the Railway Labor Act are unique because of the narrow statutory grounds for review enacted by Congress. We cannot agree.

The task of the labor arbitrator is to interpret the collective-bargaining agreement for the parties and to state the parties' bargain on specific issues where they have neglected to do so in the written agreement. Consequently, the arbitrator's award, "just as a contract, is the expression of the parties' will." *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1206 (9th Cir. 1989) (en banc), *cert. denied*, 495 U.S. 946 (1990). That rationale underlies the courts' limited review of arbitration awards; courts may only enforce the parties' agreement, they may not create an agreement for the parties. We discern no significance to the issue of public policy review, however, from the fact that the arbitrator is expressing the parties' will pursuant to a generic arbitration agreement, the National Labor Relations Act, or the Railway Labor Act; in each case the arbitrator performs the same task of expressing the parties' will. In all of those cases, the rationale underlying the public policy doctrine – that courts should not lend their authority to agreements that harm the public – applies with equal force. Accordingly, we hold that a court may refuse to enforce the parties' agreement where a public policy would be violated by enforcing the agreement, whether expressed in the form of a private contract

or an arbitration award under either the National Labor Relations Act or the Railway Labor Act.[4]

Our conclusion that arbitration awards under the Railway Labor Act are subject to public policy review does not mean, however, that courts are free to overturn any award with which they disagree. *See Misco*, 484 U.S. at 43 (Supreme Court's application of public policy review to arbitration awards "does not otherwise sanction a broad judicial power to set aside arbitration awards"); *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 598-99 (1960) (court of appeals may not overturn an arbitrator's interpretation of a contract merely because the court would have interpreted it differently).

The Supreme Court has provided detailed and explicit guidance regarding the scope of public policy review. In *W.R Grace*, the Supreme Court held that courts invoking public policy to overturn arbitration awards must be careful to rely on public policies that are "well defined and dominant" and that can be "ascertained 'by

---

[4] We note that several other courts have accepted without much discussion the idea that arbitration awards rendered under the Railway Labor Act are subject to public policy review. *See Delta Air Lines v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 674 (11th Cir. 1988) (overturning award that reinstated a pilot who had flown a plane while intoxicated), *cert. denied*, 493 U.S. 871 (1989); *Northwest Airlines v. Air Line Pilots Ass'n, Int'l*, 808 F.2d 76, 83-84 (D.C. Cir. 1987) (acknowledging public policy as basis for vacating a Railway Labor Act arbitration award, but finding no violation of public policy on the facts of that case), *cert. denied*, 486 U.S. 1014 (1988); *In re: Pan American Corp.*, 140 B.R. 336, 341 (S.D.N.Y. 1992) (same); *Schmidt v. Republic Airlines*, 630 F. Supp. 1303, 1305 (D. Minn. 1986) (same).

reference to the laws and legal precedents and not from general considerations of supposed public interests.' " 461 U.S. at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

Several terms later, the Court clarified the narrow scope of public policy review in *Misco*. In *Misco*, an employee that ran a dangerous machine in a papermill was caught by police in the company parking lot in a car with marijuana smoke filling the air and a lighted marijuana cigarette still smoldering in the ashtray. 484 U.S. at 33. The company discharged the employee for violating a company rule that prohibited employees from bringing intoxicants or narcotics onto company property or consuming them on company property. *Id.* Finding the evidence insufficient to establish that the employee had used or possessed marijuana on company property, the arbitrator upheld the employee's grievance and ordered the company to reinstate the employee with backpay and full seniority. *Id.* at 34. The district court reversed the award and the Fifth Circuit affirmed, holding that reinstatement would violate the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." *Id.* at 34-35.

The Supreme Court reversed, finding that the Fifth Circuit had failed to establish a public policy violation. *Id.* at 45. First, the Supreme Court stated that the Fifth Circuit had not drawn its conception of a public policy from existing laws and legal precedents, but had relied instead on its own considerations of the public interest. *Id.* at 44. Second, the Court held that even if the court of appeals had established a public policy against the operation of dangerous machinery by persons under the influence of

drugs or alcohol, the Fifth Circuit had engaged in impermissible factfinding in order to find a violation of that policy. *Id.* at 44-45. Specifically, the Court concluded that the Fifth Circuit had necessarily, but inappropriately, inferred that the employee had in fact used drugs on company property and would do so again in the future while operating dangerous machinery. *Id.* Because the arbitrator had made no such findings, the court of appeals overstepped the bounds of its authority to vacate the award on public policy grounds.

In light of the Supreme Court's opinions in *W.R. Grace* and *Misco*, the scope of our analysis becomes clear. We must first identify whether there exists an explicit public policy against the use of drugs by railroad employees. Second, we must determine, all the while carefully observing the Railway Labor Act's proscription against judicial factfinding, whether the Board's reinstatement of Madison to his former position violated the public policy as we have identified it.

We have no difficulty in concluding that there exists a well-defined and dominant public policy against a railroad's employment of individuals whose impaired judgment due to the use of drugs or alcohol could seriously threaten public safety. Pursuant to congressional authorization and in response to evidence implicating substance abuse in railroad accidents, the Federal Railroad Administration in 1985 promulgated a comprehensive set of detailed regulations concerning the use of alcohol and drugs by railroad employees. *See* 50 Fed. Reg. 31508 (1985) (codified as amended at 49 C.F.R. Part 219). "The purpose of [the regulations] is to prevent accidents and casualties in railroad operations that result from

impairment of employees by alcohol or drugs." 49 C.F.R. 219.1.

Specifically, the regulations prohibit railroad employees from using or possessing alcohol or drugs while on duty and from reporting for duty while under the influence of alcohol or drugs. 49 C.F.R. § 219.101; *see also* 49 C.F.R. § 219.102 (prohibiting railroad employees' usage of controlled substances at any time, whether on duty or off, effective October 2, 1989). To identify and remove employees that pose a threat due to alcohol or drug use, the regulations establish a comprehensive scheme of testing. *See* 49 C.F.R. § 219.201 (post-accident testing where the accident involves a fatality, the release of hazardous material, damage to railroad property above specified dollar amounts, or an injury aboard a passenger train); § 219.301 (reasonable cause testing under numerous circumstances); § 219.501 (pre-employment drug screens); § 219.601 (random drug testing). Moreover, the regulations contain specific actions that a railroad must take after it has determined that an employee has tested positive for drugs or alcohol in violation of the regulations. First, after a positive test result, the railroad must "immediately remove the employee from covered service." 49 C.F.R. § 219.104(a). Additionally, the railroad may not return an employee to service following a positive test until the employee has been evaluated for alcohol or drug dependence, has successfully completed a program of counseling or treatment, and has tested negative for the presence of alcohol or controlled substances. 49 C.F.R. § 219.104(d). Finally, the regulations mandate that a railroad must "exercise due diligence to assure

compliance" with all of the substance abuse regulations. 49 C.F.R. § 219.105.

We also conclude that the Board's reinstatement of Madison without determining the likelihood of his working on the railroad in the future under the influence of alcohol or drugs violates the public policy that we have just identified. Union Pacific presented to the Board test results purporting to show that Madison had been under the influence of cocaine, marijuana, and alcohol at the time that he caused a train accident by improperly lining a switch. The Board, however, never considered the validity of the testing procedures or the test results. In the face of such evidence, the Board decided to reinstate Madison without any safeguards to protect the public from the hazard of subsequent accidents that might result from Madison's continued employment, accidents that might well have consequences potentially much more serious than damage to a switch and a few railroad cars.

We emphasize that we have not decided whether Madison was in fact impaired by drugs at the time of the incident in the Cheyenne yard. Moreover, we have not decided that Madison, if addicted to drugs and alcohol, would be unresponsive to treatment so that he may never work on a railroad again. We need not reach either conclusion to find the Board's award to be contrary to public policy. If the Board had reinstated Madison after finding that the allegedly positive test results were invalid due to faulty testing procedures or some other reason, we would be obliged to enforce the award. *See Misco*, 484 U.S. at 94. Alternatively, if the Board had found that Madison had worked under the influence of drugs in the past, but after treatment or counseling could be trusted to return to

work without posing a threat to the public, we likewise would be bound to enforce the award. *See id.* Neither of those scenarios, however, is the situation here.

What violates public policy in this case is the Board's decision to reinstate to his former position a railroad employee who poses a significant risk to the public because of his potential for future drug use on the job. *See Iowa Elec. Light & Power,* 834 F.2d at 1429-30 (overturning arbitration award in favor of employee who displayed deliberate disregard for containment systems and regulations at nuclear power plant). Indeed, that rationale underlies the Federal Railroad Administration's entire regulatory scheme to control drug and alcohol abuse. That is precisely why the regulations require drug testing under so many situations and mandate that railroads remove from covered service employees that have tested positive for drugs and alcohol – to prevent employees impaired by drugs or alcohol from imperiling themselves, their co-workers, and, most importantly, the general public.

Additionally, the Board's reinstatement order places Union Pacific at risk of being found in violation of Federal Railroad Administration regulations. The regulations forbid a railroad from returning to service an employee "who has been determined to have violated" the prohibitions against drug and alcohol abuse because of a positive test result until the employee has completed certain steps designed to prevent future incidents of drug and alcohol abuse by on-duty railroad employees. 49 C.F.R. § 219.104(d). Section 219.104(d) requires that before returning to work the employee must be evaluated for alcohol or drug dependency, must successfully complete

a counseling or treatment program, and must pass toxicological tests for the presence of alcohol or drugs. The Board's award, however, ordered Union Pacific to reinstate Madison to his former position after only a normal back-to-work drug screen and without mandating that Madison and the railroad comply with all of the section 219.104(d) safeguards. If the Federal Railroad Administration were to determine that the purported positive test result was valid and required compliance with section 219.104(d), Union Pacific would face the dilemma of being forced to violate either the terms of the Board's award or federal regulations designed to keep potential abusers of drugs and alcohol out of safety-sensitive railroad jobs.

The union and Madison assert that overturning the Board's award will give railroads a license to violate with impunity rights earned by employees in a collective bargaining agreement whenever there is an allegation of drug use. Specifically, they contend that vacating the Board's award in this case will allow Union Pacific's due process violations to go unpunished. We do not agree that our decision will produce such consequences.

Arbitrators remain free to sanction railroads for violating an employee's contractual rights and to determine appropriate remedies within the confines of the collective bargaining agreement. *See International Ass'n of Machinists v. Northwest Airlines*, 858 F.2d 427, 432 (8th Cir. 1988) (upholding arbitration award under the Railway Labor Act that imposed punitive penalty on airline for failure to implement training and staffing agreement). As long as the arbitrator's remedy is "rationally explainable as a logical means of furthering the aims of the contract," *id.*

at 430, the arbitrator may, for example, impose monetary penalties, order the railroad to reimburse the employee for rehabilitation programs, order reinstatement of the employee to a position in which he poses no danger to the public, or create its own unique sanction to deter overreaching by the employer. *See, e.g., id.* at 432 (upholding punitive monetary penalty); *Delta Air Lines v. Air Line Pilots Ass'n, Int'l,* 861 F.2d 665, 674-75 (11th Cir. 1988) (upholding reimbursement for costs of private rehabilitation). Indeed, where the arbitrator makes a rational finding that the employee discharged for violation of the alcohol and drug regulations can be a trusted to refrain from using drugs and alcohol on the job again, the arbitrator may reinstate the employee to his former position, and we will be obliged to affirm the award. *See Misco,* 484 U.S. at 45. The only option that we have foreclosed today on public policy grounds is the reinstatement of a railroad employee to a safety-sensitive position in those cases in which the employee poses a significant risk to the public because of the danger of future substance abuse.

We now turn to the district court's decision to remand this case for a second on-property hearing on the merits of the Rule G allegations. The union and Madison argue that the district court acted without authority in ordering a second hearing. Moreover, they assert that the practical effect of the order would be to forgive Union Pacific's due process violations in conducting the first hearing, a decision that belongs solely to the arbitrator. We agree.

The review provisions of the Railway Labor Act expressly authorize a district court to remand the case to the public law board. 45 U.S.C. § 153 First(q) ("The court

shall have jurisdiction to affirm the order of the [adjustment board] or to set it aside, in whole or in part, or it may remand the proceeding to the [adjustment board] for such further action as it may direct."). Section 153 First(q) does not authorize a remand to the company some three years after the incident, however, when the collective bargaining agreement requires that on-property hearings be held within five days of when charges are brought against an employee. The district court's remand order would amount to an interpretation or modification of the parties' agreement, which would do violence to the rule that it is the arbitrator's duty to interpret the agreement. *See Brotherhood of Maint. of Way Employees v. Chicago & N.W. Transp. Co.*, 827 F.2d 330, 333 (8th Cir. 1987) (citations omitted), *cert. denied*, 485 U.S. 988 (1988); *see also* 45 U.S.C. § 153 First(i).

Moreover, a remand to the company for a second hearing solely on the merits of the Rule G violation would overstep the bounds of public policy review. As the Supreme Court held in *Misco*, reviewing courts are not allowed to make factual findings when setting aside arbitration awards on public policy grounds. 484 U.S. at 44-45. The district court's order, in effect, finds either that Union Pacific did not violate Madison's due process rights as guaranteed by the collective bargaining agreement or that the violation was so insignificant that it should be disregarded and a new, properly conducted hearing be held. Either alternative would impermissibly contradict an express finding by the Board.

Accordingly, we reverse that portion of the district court's order remanding the case to the Board. We remand the case to the district court with directions that

it remand the case to the Board so that the Board may conduct whatever additional factual investigation it deems necessary and determine whatever remedies it deems appropriate for both Madison's conduct and Union Pacific's procedural improprieties. Whether a remand to the company for a second on-property hearing is necessary or allowable under the collective bargaining agreement is a matter that is left to the Board's discretion.

That portion of the district court's order vacating the Board's award is affirmed. That portion of the order remanding the case to the Board is reversed, and the case is remanded to the district court with the directions set forth above.

McMILLIAN, Circuit Judge, dissenting.

For the reasons discussed below, I cannot agree with majority opinion's holding that federal courts can vacate arbitration awards under the Railway Labor Act on public policy grounds. Accordingly, I would reverse the decision of the district court and enforce the decision of the board reinstating the employee, subject to the usual back-to-work examination, and awarding him back pay less 90 days for mishandling the switch.

Whether there is a public policy exception under the Railway Labor Act is a difficult question. On the one hand, as noted by the majority opinion, the scope of judicial review of arbitration awards under the Railway Labor Act is "among the narrowest known to the law." *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 858 F.2d 427, 429 (8th Cir. 1988). The Railway Labor Act limits judicial review of arbitration awards to three specific grounds: (1) failure of the board to comply with the

requirements of the Railway Labor Act, (2) failure of the board to conform or confine itself to matters within the scope of its jurisdiction, and (3) fraud or corruption. 45 U.S.C. § 153 First (q). The Supreme Court has emphasized that arbitration awards under the Railway Labor Act "may be set aside only for the three reasons specified therein" and that "this statutory language means just what it says." *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 93 (1978) (per curiam) (citations omitted).

On the other hand, as also noted by the majority opinion, courts must refuse to enforce private contracts, including collective bargaining agreements and arbitration awards, where enforcement would violate the law or would be contrary to public policy. *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948). The Supreme Court discussed the public policy exception at some length in *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber, Cork, Linoleum, & Plastic Workers*, 461 U.S. 757 (1983) (*W.R. Grace*), and *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987) (*Misco*). Whether an arbitration award violates public policy is a legal question. *W.R. Grace*, 461 U.S. at 766. The public policy in question must be explicit, well defined and dominant, and ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Misco*, 484 U.S. at 43, *citing W.R. Grace*, 461 U.S. at 43, "Precisely because [the public policy exception] allows courts to by-pass the normal heavy deference accorded to arbitration awards and potentially to 'judicialize' the arbitration process, the judiciary must be cautious about overruling an arbitration award on the ground that it conflicts with public policy." *E.I. DuPont de*

Nemours & Co. v. Grasselli Employees Independent Ass'n of East Chicago, Inc., 790 F.2d 611, 615 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986).

The problem is that *W.R. Grace* and *Misco* were not decided under the Railway Labor Act but under the National Labor Relations Act (NLRA). Neither *W.R. Grace* nor *Misco* refers to the Railway Labor Act or *Union Pacific R.R. v. Sheehan*. Most of the cases that have applied the public policy exception do not involve the Railway Labor Act. *See, e.g., Stead Motors v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200 (9th Cir. 1989) (banc), *cert. denied*, 495 U.S. 946 (1990); *Iowa Electric Light & Power Co. v. Local Union 204, IBEW*, 834 F.2d 1424 (8th Cir. 1987). As noted by the majority opinion, the handful of cases that involved the Railway Labor Act assumed without much analysis that the public policy exception applied. *See* slip op. at 10 n.4 (citing cases). I have found only one case that expressly refused to recognize a public policy exception under the Railway Labor Act. *Union Pacific R.R. v. United Transportation Union*, 820 F. Supp. 1198 (D. Neb. 1993), *appeal docketed*, No. 93-2119 (8th Cir. May 4, 1993).[1]

---

[1] The facts in that case are similar to those in the present case. A railroad employee tested positive for cocaine. A hearing was conducted and he was found to have violated Industry Rule G and was discharged. Certain procedural irregularities occurred at the hearing. The union appealed on procedural grounds and the matter was submitted for arbitration to a public law board. The board found that one of the procedural irregularities had fatally tainted the proceedings and required reversal. The board noted that it could not reinstate the employee to train service without safeguards in light of his cocaine use. The board awarded the employee backpay and conditioned his reinstatement upon participation in the

Absent some affirmative indication from the Supreme Court or Congress, I am unwilling to add the public policy exception to the narrow scope of judicial review of arbitration awards under the Railway Labor Act. The limited grounds for review are specified in the Railway Labor Act and the Supreme Court has stated that the statutory language means what it says. I am also reluctant to draw an analogy between the NLRA and the Railway Labor Act in order to transplant the public policy exception from one statute to the other. Although the Supreme Court has referred to the NLRA and other federal labor laws for assistance in construing the Railway Labor Act, the two statutory schemes are not the same, and cases decided under the NLRA are not necessarily controlling under the Railway Labor Act. *See, e.g., Air Line Pilots Ass'n v. O'Neill*, 111 S. Ct. 1127, 1137 (1991); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, 392 (1969).

Because Union Pacific's public policy objection to the board's decision does not fall within any of the three limited categories of judicial review specified by the Railway Labor Act, I would reverse the decision of the district court and enforce the decision of the board reinstating the employee, subject to the usual back-to-work examination, and awarding him back pay less 90 days for mishandling the switch. There has been no

---

railroad's substance abuse rehabilitation program. The railroad objected and sought to vacate the award on public policy grounds. The union argued that the scope of judicial review of arbitration awards under the Railway Labor Act did not include the public policy exception.

alleged fraud or corruption on the part of the board, and the board did not fail to comply with the Railway Labor Act or exceed its jurisdiction. The board did not reach the merits of the Rule G violation, that is, whether the employee had used alcohol or controlled substances, because it found that the hearing officer had abandoned his role as factfinder and, as a result, the employee had been denied the fair hearing prior to administering discipline to which he was entitled under the rules set forth in the collective bargaining agreement.

Finally, even assuming that there is a public policy exception under the Railway Labor Act, I would argue that the focus should be on whether the award, not the underlying misconduct, violates an explicit, well-defined and dominant public policy ascertained by reference to laws and legal precedent. *See Stead Motors v. Automotive Machinists Lodge No. 1173*, 886 F.2d at 1215-17 (plurality) (Reinhardt, J.) ("the critical inquiry is not whether the underlying act for which the employee was disciplined violates public policy, but whether there is a public policy barring *reinstatement* of an individual who has committed a wrongful act"). Accepting for purposes of analysis that there is an explicit, well-defined and dominant public policy which is sufficiently based in laws and legal precedents against alcohol or drug use by employees on the job, I do not agree that that public policy would necessarily bar reinstatement of an employee who engaged in that sort of conduct in the past but who has since been rehabilitated. *See Delta Air Lines, Inc. v. Air Line Pilots Ass'n*, 861 F.2d 665, 674 (11th Cir. 1988) ("There is no public policy against rehiring former alcoholics, post-

rehabilitation."), *cert. denied,* 493 U.S. 871 (1989); *Northwest Airlines, Inc. v. Air Lines Pilots Ass'n,* 808 F.2d 76, 83-84 (D.C. Cir. 1987) (enforcing award reinstating former alcoholic pilot who had been recertified by FAA for flight duty), *cert. denied,* 486 U.S. 1014 (1988). Here, the board conditioned reinstatement of the employee upon the employee's successfully passing the "usual back-to-work examination" which includes drug screening.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-2547NEO

Union Pacific Railroad Company,	* Appeal from the United
Appellee,	* States District Court for the
	* District of Nebraska
vs.	*
United Transportation Union, also known as C & T, also known as UTU; Kent H. Madison,	*
Appellants.	*

JUDGMENT

(Filed Oct. 7, 1993)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part, reversed in part, and cause is remanded to the district court for proceedings consistent with the opinion of this court.

August 19, 1993

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Mandate Issued October 5, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

UNION PACIFIC RAILROAD COMPANY, Plaintiff, v. UNITED TRANSPORTATION UNION, et al., Defendants.	8:CV91-00392 ORDER AND JUDGMENT

Pursuant to the memorandum opinion entered herein this date,

IT IS ORDERED that plaintiff Union Pacific Railroad Company's motion for summary judgment (Filing No. 12) is granted; defendants United Transportation Union and Kent Madison's motion for summary judgment (Filing No. 13) is denied. This action is remanded to Public Law Board No. 4689 with directions to vacate its award of reinstatement and to remand this action to a hearing officer who shall, upon a notice of hearing and in conformity with the collective bargaining agreement between United Transportation Union and Union Pacific Railroad Company, conduct a hearing to determine whether there has been a violation of Rule G of the collective bargaining agreement.

DATED this 12th day of June, 1992.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

UNION PACIFIC RAILROAD COMPANY,	)	8:CV91-00392
Plaintiff,	)	MEMORANDUM OPINION
v.	)	
UNITED TRANSPORTATION UNION, et al.,	)	
Defendants.	)	

This matter is before the Court on plaintiff Union Pacific Railroad Company (hereinafter "Union Pacific") and defendants United Transportation Union (hereinafter "United") and Kent Madison's cross-motions for summary judgment (Filing Nos. 12 and 13). Union Pacific filed this action pursuant to 45 U.S.C. § 153 First (q), seeking to review and set aside an arbitration award. United and Madison filed a counterclaim, seeking enforcement of the same arbitration award. Jurisdiction of the Court is premised upon 28 U.S.C. §§ 1331 and 1337.

The facts underlying this controversy are not in dispute. On January 9, 1989, Madison was employed by Union Pacific as a brakeman. At approximately 10:50 p.m. on that date, Union Pacific's manager of training and industrial operations, W. R. Lake, heard a radio communication concerning a run-through switch. As part of an investigation, Lake met with crew members about the incident, and upon questioning, Madison admitted that

he had improperly lined a switch against the movement of the train, causing two and a half cars to go through the switch, resulting in its damage.

Madison was sent to Laramie County Memorial Hospital for a reasonable-cause toxilogical test pursuant to federal regulations, see 49 C.F.R. § 219.301, and was informed that he was being removed from service pending the results of the tests. The results of the test indicated that Madison tested positive for alcohol, cocaine, and marijuana.

On January 13, 1989, Madison received a notice of hearing to investigate possible violations of Union Pacific Railroad rules, including Rule G, an industry-wide operating rule forbidding the use of drugs and alcohol on the job. On January 17, 1989, an investigation hearing was held before a hearing officer in Cheyenne, Wyoming, to determine whether charges against Madison should be sustained. On January 24, 1989, Madison was notified the charges against him were sustained and that he was dismissed from service for violating Rule G.

The Union appealed on Madison's behalf, and the dispute was ultimately heard by a Public Law Board, which found that Madison did not receive a fair hearing prior to being disciplined. In the opinion of a majority of the Public Law Board, the hearing officer did not confine his inquiry to the matters contained in the January 13, 1989, notice. Specifically, a majority of the arbitrators found that because the hearing officer verbally noted that Madison reeked of alcohol and because the hearing officer brought in two other hearing officers to determine if they could detect alcohol on Madison, the hearing was

unfair. A majority of the Public Law Board stated that the hearing officer, in noting that Madison reeked of alcohol, abandoned his role as a factfinder and, therefore, denied Madison a fair hearing guaranteed by the collective bargaining agreement between United and Union Pacific.

Although a majority of the Public Law Board found that Madison did not receive a fair hearing before the hearing officer, it sustained the lost time and lost pay penalty imposed by the hearing officer for the improper alignment of the switch. Union Pacific was ordered to return Madison to service with full rights and pay for all lost time, except for ninety (90) calendar day's pay assessed for improper aligning and the resulting damage to the switch. Madison's reinstatement was conditioned upon his successfully passing all the back-to-work examinations.

Union Pacific filed a dissent to the Public Law Board's majority opinion, asserting that the award violated public policy because the majority ordered back to work a proven user of alcohol and drugs. In addition, Union Pacific maintained that it was inconceivable that the board could find that the hearing was procedurally correct when sustaining the ninety-day (90) discipline for improperly throwing the switch, but procedurally deficient when addressing the Rule G violation. Rather than reinstate Madison, Union Pacific filed this action.

Union Pacific moves for summary judgment, maintaining that the arbitrators' decision should be vacated because the Public Law Board's decision is contrary to

public policy.[1] United maintains that there is no public policy exception which would allow this Court to set aside the Public Law Board's decision and that, as a matter of law, the Public Law Board's decision should be upheld.

Summary judgment is proper if there is no genuine issue of material fact, and the moving party should prevail as a matter of law. Fed. R. Civ. P. 56(c). However, the scope of judicial review of adjustment board awards under the Railway Labor Act is among the narrowest known to the law. *International Assoc. of Machinists & Aerospace Workers v. Northwest Airlines*, 858 F.2d 427, 429 (8th Cir. 1988) (quoting *Benoni v. Boston & Maine Corp.*, 828 F.2d 52, 54 n.3 (1st Cir. 1987) in turn quoting *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970)). Courts may set aside board orders on three grounds: (1) the board's failure to comply with the provisions of the Railway Labor Act; (2) failure of the order to confine itself to matters within the scope of its jurisdiction; and (3) fraud or corruption. 45 U.S.C. § 153, First (q); *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89, 93 (1978) (per curiam); *Northwest Airlines*, 858 F.2d at 429.

As the United States Court of Appeals for the Eighth Circuit stated in *Iowa Electric Light & Power Co. v. Local Union 204 of Int'l Bhd. of Electrical Workers*, 834 F.2d 1424 (8th Cir. 1987), "[t]his court has resisted the temptation to tamper with labor awards that we might have decided

---

[1] Union Pacific alternatively argues that the Public Law Board exceeded its jurisdiction. Given the disposition of this action, the Court need not address plaintiff's alternative argument.

differently were we the arbitrator, and we have consistently observed that '[j]udicial review of an arbitrator's award is extremely limited * * * .' " *Id.* at 1426 (quoting *Manhattan Coffee Co. v. International Bhd. of Teamsters, Local No. 688*, 743 F.2d 621, 624 (8th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985)). The decision of an arbitrator who has not exceeded his contractual authority is almost always upheld. *Id.*

One of the exceptions to the requirement that courts defer to the awards of arbitrators, however, is the now-well-settled rule that a court need not, in fact, cannot enforce an award that violates public policy. *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1209 (9th Cir. 1989), *cert. denied*, 495 U.S. 946 (1990). "If the contract as interpreted by [the arbitrator] violates an explicit public policy, [courts] are obliged to refrain from enforcing it." *Iowa Electric Light & Power*, 834 F.2d at 1427 (quoting *W. R. Grace & Co. v. Local Union 759, Int'I Union of the United Rubber Workers*, 461 U.S. 757, 756 (1983)).

Once a public policy question is raised, a court must address it by taking the facts as found by the arbitrators, but reviewing its conclusions *de novo*. *Id.* Most importantly, considerations must be based only on public policy that is "well defined and dominant, and * * * ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interest.' " *W. R. Grace*, 461 U.S. at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). The critical inquiry is not whether the underlying act for which the employee was disciplined violates public policy, but whether there is a public policy barring reinstatement of an individual

who has committed wrongful acts. *Stead Motors*, 886 F.2d at 1215 (citing *Grace*, 461 U.S. at 766, and *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987)).

The Court has no difficulty in concluding there is a well-defined public policy against drug and alcohol use in the railroad industry and, more importantly, against reinstating railroad employees in safety sensitive areas whose abuse of drugs and alcohol has jeopardized the safety of the general public and fellow employees. Pursuant to the Federal Railway Safety Act of 1970, the Secretary of Transportation was authorized to prescribe, as necessary, appropriate rules, regulations, and standards for all areas of railroad safety. 45 U.S.C. § 431(a). In response to drug and alcohol abuse by railroad employees who posed a serious threat to safety, the Federal Railroad Administration issued drug testing regulations in 1985, which were implemented to prevent accidents and casualties in railroad operations that were the result of alcohol and drug abuse by employees. 49 C.F.R. § 219.1. These regulations call for drug and alcohol testing on a pre-employment, reasonable cause, post accident, and post-incident bases. 49 C.F.R. §§ 219.201, 219.301 & 219.501. Federal Railroad Administration regulations also require railroad employees to submit to toxicological testing after: train accidents resulting in a fatality; the release of hazardous materials accompanied by an evacuation or an injury; damage to railroad property of $500,000 or more; unique "impact accidents" that result in a reportable injury or $50,000 in damages; or any train incident that results in the death of on duty railroad employees. 49 C.F.R. § 219.201. In addition, testing of

railroad workers is authorized after observation of certain behavior patterns, negligent acts or omissions, or violations of company safety or operating rules. 49 C.F.R. § 219.301.

Rule G, as promulgated by Union Pacific in 1989, bars employees from using alcohol when on duty, on company property, or when subject to duty. In addition, Rule G prohibits the use of any drug, narcotic, or controlled substances at any time either on or off duty. Significantly, the Federal Railroad Administration codified the rules under Rule G, by prescribing substantially identical rules as a matter of federal law. *See* 49 C.F.R. § 219.101 and 219.102.

In addition to declaring the general proscription of drug and alcohol abuse in the railroad industry as a whole, the Federal Railroad Administration has, more specifically, prescribed regulations directed at actions which a railroad must take once it learns that an employee has tested positive for drugs or alcohol. 49 C.F.R. § 219.104. "If the railroad determines there is a reason to believe that an employee has violated [federal regulations regarding the proscription of drug and alcohol use] as evidenced by a positive test result * * * , the railroad shall immediately remove the employee from covered service." 49 C.F.R. § 219.104(a). Furthermore, an employee who has tested positive for drugs or alcohol shall not be returned to service unless the employee has been evaluated to determine whether he is affected by a psychological or physical dependence on alcohol or controlled substances, has successfully completed a program of counseling or treatment, and has tested negative for

controlled substances or alcohol. 49 C.F.R. § 219.104(d)(1)-(3).

In sum, the Court concludes that there is ample congressional and administrative proscription of drug and alcohol use within the railroad industry for the Court to conclude that there is a strong, well-defined policy against drug and alcohol use by railroad employees sufficient to set aside an arbitrator's award which reinstates a railroad employee whose use of alcohol or drugs has jeopardized the safety of the general public and fellow employees.

The Court must next turn to the question of whether the Public Law Board's decision in this matter violated this clearly established public policy. United does not dispute that the Public Law Board ordered the reinstatement of a employee who, after submitting to toxicological testing, was found to have cocaine, marijuana, and alcohol in his system. However, the Court's inquiry is complicated by the fact that the Public Law Board's decision was based upon a perceived procedural defect in the hearing conducted by Union Pacific's hearing officer. Once a majority of the Public Law Board determined that the hearing was procedurally defective under the collective bargaining agreement, it did not reach the merits of the hearing officer's decision on the alleged Rule G violations.

Section 153, First (q) of Title 45 of the United States Code provides that the Court shall have jurisdiction to "affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct." 45

U.S.C. § 153, First (q). In the interests of justice, and in furtherance of the clearly defined public policy against the use of drugs and alcohol in the railroad industry and against reinstating railroad employees who use alcohol or drugs, the Court will remand this action to Public Law Board No. 4689, with directions to vacate its award of reinstatement and to order that another hearing be scheduled for K. H. Madison before a hearing officer in accordance with the terms of the collective bargaining agreement between United and Union Pacific. An order in conformity with this memorandum opinion will issue this date.

DATED this 12th day of June, 1992.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2547NEO

United Pacific Railroad Company, Appellee,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
vs.	*	
United Transportation Union, etc., et al.,	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

September 27, 1993

Order entered at the direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

45 U.S.C. § 153 First (p) and (q)

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside accept for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for

fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

* * *

Section 153 Second, Title 45, United States Code, provides:

> **Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards.** Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.
>
> If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the

date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or

group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply there with on or before the day, named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.